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COURT OF APPEALS  
DIVISION II

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STATE OF WASHINGTON  
BY  \_\_\_\_\_  
DEPUTY

NO. 37247-9-II  
Cowlitz County No. 07-1-01239-4

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**STATE OF WASHINGTON,**

**Respondent,**

**vs.**

**EDDY D. GLACE**

**Appellant.**

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**AMENDED BRIEF OF APPELLANT**

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**A. ASSIGNMENT OF ERROR**

**I. THE SEARCH OF MR. GLACE WHICH REVEALED MARIJUANA WAS UNLAWFUL UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION.**

**II. MR. GLACE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO BRING A MOTION TO SUPPRESS THE MARIJUANA THAT WAS FOUND DURING THE UNLAWFUL SEARCH AND SEEK DISMISSAL OF THE CASE.**

**B. ISSUE PERTAINING TO ASSIGNMENT OF ERROR**

**I. THE SEARCH OF MR. GLACE THAT PRODUCED THE BAG OF MARIJUANA WAS UNLAWFUL UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION AND MR. GLACE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO BRING A MOTION TO SUPPRESS THE MARIJUANA.**

**C. STATEMENT OF THE CASE**

The Cowlitz County Prosecuting Attorney charged Appellant Eddy Daniel Glace with one count of possession of marijuana in an amount greater than forty grams. CP 1. Mr. Glace was tried in a non-jury trial on the sole count of the information. Report of Proceedings. The evidence presented by the State came primarily from Kelso Reserve Police Officer Jacob Stout. Report of Proceedings. Officer Stout testified that he was driving westbound on Allen Street in Kelso when he had to swerve to miss Mr. Glace, who was riding his bike eastbound in the westbound lane. RP

21. It was nighttime and dark, and Mr. Glace did not have any lighting on his bike. RP 21. At that point Officer Stout yelled out his patrol car window and ordered Mr. Glace to pull over, and “initiated a traffic stop.” RP 22. Stout activated his emergency lights. RP 22. Stout got out of his car and told Mr. Glace to stay where he was. RP 22. Stout testified that Mr. Glace was “agitated, nervous, and mumbling.” RP 22.

When Stout was asked to further describe Mr. Glace’s demeanor, he said that Mr. Glace was nervous, mumbled, and “was wanting to put his hands in his pockets and take them out nervously.” RP 23. Stout testified Mr. Glace was using both hands and putting them in his front and back pockets. RP 23. Stout testified that Mr. Glace’s behavior “was concerning me for officer safety reasons.” RP 23. Stout decided he would do a *Terry* frisk, and asked Mr. Glace if he had any weapons on him. RP 23. Mr. Glace said “no.” RP 23. Instead of conducting the frisk, however, Stout then asked Mr. Glace if he “had anything on his person that he should not have.” RP 23. According to Stout’s testimony, Mr. Glace then told him that he had marijuana in his back pocket.” RP 23-24.

Stout testified that the nature of the encounter changed, and he “advised the suspect he was not free to leave.” RP 24. Next, Stout searched Mr. Glace’s back left pocket and removed a bag of material that looked like tobacco. RP 24. Stout observed the material in the bag and

based on his training and experience, believed it to be marijuana. RP 27. At that point, based on his observation of the material, Stout placed Mr. Glace under arrest. RP 28. A later test by the Washington State Crime Laboratory proved that the bag contained roughly 47 grams of marijuana. CP 11 (Finding of Fact #10).

Defense counsel did not bring a motion to suppress the marijuana evidence. Report of Proceedings. The trial court, based on the evidence presented by the State, found Mr. Glace guilty of possession of marijuana in an amount over forty grams. CP 12. Although the trial court entered findings of fact and conclusions of law on the non-jury trial (CP 10-12), none were entered pertaining specifically to the search of Mr. Glace because, as noted, Defense Counsel did not bring a motion to suppress. Mr. Glace received 366 days of incarceration and 9 to 12 months of community custody. CP 19. This timely appeal followed. CP 28.

#### **D. ARGUMENT**

##### **I. THE SEARCH OF MR. GLACE THAT PRODUCED THE BAG OF MARIJUANA WAS UNLAWFUL UNDER ARTICLE 1, SECTION 7 OF THE WASHINGTON STATE CONSTITUTION AND MR. GLACE WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS ATTORNEY FAILED TO BRING A MOTION TO SUPPRESS THE MARIJUANA.**

Preliminarily, Defense Counsel's failure to bring a motion to suppress the marijuana must be addressed because ordinarily, the failure to

challenge an unlawful search would waive any challenge to the search on appeal. See *State v. Mierz*, 72 Wn.App. 783, 789, 866 P.2d 65 (1994). However, the Washington State Supreme Court has ruled that an appellant can obtain relief on appeal, where he failed to bring a motion to suppress in the proceedings below, when his counsel was ineffective in failing to bring a motion to suppress evidence and where there is a reasonable possibility that had counsel brought the motion, the outcome of the proceedings would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004). Further, neither the trial court nor this Court is bound by an erroneous concession of law by Mr. Glace's trial counsel. In *State v. Knighten*, 109 Wn.2d 896, 748 P.2d 1118 (1988), the Supreme Court ruled that the State's erroneous concession of a lack of probable cause to arrest in that case was not binding upon the Court, and ultimately ruled that probable cause in fact existed. Additionally, the reasonableness of the initial stop can be raised for the first time on appeal. In *State v. Contreras*, 92 Wn.App. 307, 313-14, 966 P.2d 915 (1998), Division II held that so long as the record is sufficiently developed so the Court can determine whether a motion to suppress would have been granted or denied, a suppression issue can be raised for the first time on appeal, pursuant to R.A.P. 2.5, when it involves a manifest constitutional error. This is in contrast to Division I's approach, in which they will not

review a claim of an illegal seizure for the first time on appeal except through a claim of ineffective assistance of counsel. *Contreras* at 317-18, citing *State v. Mierz*, 72 Wn.App. 783, 789, 866 P.2d 65 (1994).

Here, the record is sufficiently developed for this Court to review Mr. Glace's claim that the search of his person which revealed marijuana was conducted without authority of law. The fact pattern is not particularly long or complicated; all of the facts pertaining to the seizure and to the subsequent search were laid out during the non-jury trial. For the reasons stated below, Officer Stout's search of Mr. Glace's pocket was unlawful and if Defense Counsel had brought a motion to suppress the marijuana, the trial court would have been required to grant it and the outcome of the proceedings would have been different.

**a. Search not justified under the Terry frisk doctrine.**

"Warrantless seizures are per se unreasonable. A warrantless seizure may, however, be reasonable if it is supported by consent or exigent circumstances, or if the search is incident to a valid arrest or a Terry investigative stop." *State v. Barnes*, 96 Wn.App. 217, 221, 978 P.2d 1131 (1999), citing *State v. Rife*, 133 Wn.2d 140, 150-51, 943 P.2d 266 (1997). "For a permissible Terry stop the State must show that (1) the initial stop is legitimate; (2) a reasonable safety concern exists to justify the protective frisk for weapons; and (3) the scope of the frisk is limited to

the protective purposes.” *State v. Duncan*, 146 Wn.2d 166, 172, 43 P.3d 513 (2002), citing *State v. Collins*, 121 Wn.2d 168, 173, 847 P.2d 919 (1993). The initial stop is legitimate if it is based on a well-founded suspicion of criminal activity. *State v. White*, 97 Wn.2d 92, 105, 640 P.2d 1061 (1982). The Supreme Court has defined “articulable suspicion” as a “substantial possibility that criminal conduct has occurred or is about to occur.” *State v. Kennedy*, 107 Wn.2d 1, 6, 726 P.2d 445 (1986).

At the outset, it must be observed that Officer Stout did not actually conduct a *Terry* frisk. Prior to retrieving the marijuana, all Stout did was ask Mr. Glace if he had any weapons on him, to which Mr. Glace said “no,” and asked him if he had any contraband on him, to which Mr. Glace replied that he had marijuana. After retrieving the bag of marijuana, Stout did not ultimately conduct a weapons frisk. As such, this marijuana was not found during the course of a *Terry* frisk but rather during an unjustified search for contraband. The fact that Officer Stout moved straight from asking Mr. Glace if he had any weapons to asking him if he had any contraband, rather than conducting the *Terry* frisk, demonstrates that Officer Stout was on a fishing expedition for probable cause of some crime. Further, whether Mr. Glace possessed contraband had nothing to do with whether he possessed weapons and posed a danger to Officer Stout.

Further, Officer Stout did not have grounds to conduct a *Terry* frisk. Here, there is no question that Mr. Glace was seized. “Where an officer commands a person to halt or demands information from the person, a seizure occurs. *State v. Cormier*, 100 Wn.App. 457, 460, 997 P.2d 950 (2000), citing *United States v. Mendenhall*, 446 U.S. 344, 554, 100 S.Ct. 1870 (2000). See also *State v. Gatewood*, 163 Wn.2d 534, 540, 182 P.3d 426 (2008). Further, Officer Stout’s testimony, assuming it is credible for purposes of this argument, established a basis on which to seize Mr. Glace. Mr. Glace committed the infractions of operating his bicycle without required lighting under RCW 46.61.780 and improper operation of his bicycle under RCW 46.61.770. So while the detention may have been justified at its inception, Officer Stout did not have a reasonable safety concern to justify the protective frisk for weapons. Officer Stout testified that Mr. Glace was nervous and mumbling and “was wanting to put his hands in his pockets and take them out nervously.” RP 23. This is not enough to cause a safety concern that would justify a protective frisk for weapons.

An officer must point to specific and articulable facts which, coupled with rational inferences, create an objectively reasonable belief or well-founded suspicion that the person is a safety risk. *Cormier* at 461, citing *Terry v. Ohio*, 392 U.S. 1, 24-25, 88 S.Ct. 1868 (1968). The

reviewing court will consider the totality of the circumstances surrounding the stop in evaluating the *Terry* factors. *Cormier* at 461. In *State v. Setterstrom*, 163 Wn.2d 621, 183 P.3d 1075 (2008), the Supreme Court addressed the question of what conduct justifies a *Terry* frisk. In *Setterstrom*, police officers were called to the DSHS office in Tumwater to investigate two subjects because a caller had alleged that one of the subjects was sleeping and one of the subjects (*Setterstrom*) appeared to be under the influence of something. *Setterstrom* at 2. The officers arrived and found *Setterstrom* filling out a benefits application. *Id.* When asked his name by one of the officers, *Setterstrom* lied and said his name was Victor Garcia. *Id.* One of the officers described *Setterstrom* as acting nervous and fidgeting, and believed he was under the influence. *Id.* Based on this, the officer feared danger and patted *Setterstrom* down for weapons, finding contraband narcotics. *Id.* at 3. The Court reversed *Setterstrom*'s conviction, holding that the officer's observation of nervous and fidgety behavior, coupled with the suspect lying about his name and that fact that he was under the influence, did not justify a reasonable belief that *Setterstrom* was armed and presently dangerous. *Id.* at 6. Like the officer in *Setterstrom*, Officer Stout did not have a reasonable concern for danger justifying a protective frisk.

Although Officer Stout did not have a basis on which to conduct a *Terry* frisk, and in fact didn't conduct a *Terry* frisk but rather a search, the State may argue that the search of Mr. Glace was nevertheless justified because when Officer Stout asked Mr. Glace if he had contraband, Mr. Glace answered that he had marijuana. However, the third prong of *Terry* requires that the scope of the frisk be limited to finding weapons. *Setterstrom* at 5. Here, even taking the testimony in a light most favorable to the State, it is clear that the primary motivation of Officer Stout was to search for contraband because he asked Mr. Glace whether he had contraband before even bothering to conduct a weapons frisk.

In *State v. Tijerina*, 61 Wn.App. 626, 811 P.2d 241 (1991), the defendant was stopped for a traffic infraction. Having decided not to issue a ticket for the infraction, the State Trooper nevertheless questioned Mr. Tijerina about matters which did not relate to the traffic stop and eventually obtained consent to search Mr. Tijerina's car. *Tijerina* at 628. Illegal drugs were found during the search. *Tijerina* at 628. Division III held that the questioning of Mr. Tijerina which exceeded the scope of the initial detention for the traffic infraction had to be based on articulable facts from which the officer could reasonably suspect criminal activity. *Tijerina* at 629, citing *State v. Gonzales*, 46 Wn.App. 388, 394, 731 P.2d 1101 (1986).

Here, Officer Stout's question to Mr. Glace whether he had any contraband, after he had already asked if Mr. Glace had any weapons on him, was unrelated both to the purpose of the initial detention (the two bicycle infractions) and to the purpose of the planned *Terry* frisk. The purpose of the question was to fish for evidence of a crime during the course of an unrelated seizure. Because this question exceeded the scope of the *Terry* frisk that Officer Stout planned to conduct, this alone defeats the lawfulness of a *Terry* frisk in this case and cannot be relied upon to justify this search. As the *Setterstrom* Court noted: "The failure of any of these [factors] makes the frisk unlawful and the evidence seized inadmissible." *Setterstrom* at 5.

**b. Search not justified as a search incident to arrest.**

Officer Stout did not place Mr. Glace under arrest prior to reaching into his pocket and removing the bag of marijuana. Under *State v. O'Neill*, 148 Wn.2d 564, 62 P.2d 489 (2003), this search cannot be justified under the search incident to arrest exception to the warrant requirement because the arrest *must* precede the search. In *O'Neill*, a police officer approached Mr. O'Neill while he was parked in the parking lot of a closed business and asked him for his identification. *O'Neill* at 570. Mr. O'Neill told the officer, in response, that he was driving on a revoked license. *O'Neill* at 570. The officer then asked O'Neill to step

out of the car and as O'Neill did, the officer saw what looked like drug paraphernalia in open view on the floorboard. *O'Neill* at 570. The officer then eventually obtained consent to search the car and found more drug paraphernalia. *O'Neill* at 570. The officer then arrested Mr. O'Neill. *O'Neill* at 570. The Supreme Court made several holdings in *O'Neill*, most of which are not at issue in this case. The holding the Supreme Court made that is at issue in this case was the holding that a search incident to a lawful arrest must come after the arrest. *O'Neill* at 583. The State, in *O'Neill*, argued that the search incident to arrest should be upheld even if it preceded the arrest so long as the officer had probable cause to make an arrest. *O'Neill* at 583. Because Mr. O'Neill had admitted to driving on a revoked license and because the officer had seen paraphernalia in the car in plain view, probable cause existed to arrest Mr. O'Neill for at least two crimes. The Supreme Court rejected this reasoning:

[P]robable cause for a custodial arrest is not enough. There must be an actual custodial arrest to provide the "authority" of law justifying a warrantless search incident to arrest under Article 1, section 7. Because a search cannot occur without "authority of law," and the search incident exception to the warrant requirement is a narrow one, we conclude that the state constitution requires an actual custodial arrest before a search occurs.

*O'Neill* at 585.

The Supreme Court further held that the State cannot rely on the inevitable discovery doctrine in the search incident to arrest context:

[B]ecause it would undermine our holding that a lawful custodial arrest must be effectuated before a valid search incident to arrest can occur. If we apply the inevitable discovery rule, there is no incentive for the State to comply with article 1, section 7's requirement that the arrest precede the search.

*O'Neill* at 592.

Had Defense Counsel brought a motion to suppress the evidence seized during this search the court would have been required to grant the motion. There was no *Terry* frisk here. Although Officer Stout decided to do a *Terry* frisk, he moved straight from asking Mr. Glace whether he had any weapons to asking him if he had contraband. When he received a positive response to that question, Officer Stout searched Mr. Glace's back pocket for the contraband rather than proceeding with the *Terry* frisk. After removing the bag and sniffing and looking at its contents, Officer Stout then placed Mr. Glace under arrest for possessing the marijuana he had already recovered during an unlawful search. Because this search cannot be justified as having occurred during a *Terry* frisk, which cannot be a search specifically for contraband, and because it cannot be justified as a search incident to arrest because Officer Stout did not place Mr. Glace under arrest until after the search, the trial court would have been required to grant a motion to suppress this evidence. Suppression of this evidence

would have required dismissal of the case and, as such, it is obvious that the outcome of the proceedings would have been different had Defense Counsel brought a motion to suppress the marijuana.

**E. CONCLUSION**

Mr. Glace was prosecuted based on evidence that was obtained in an unlawful search. Mr. Glace was denied effective assistance of counsel when his attorney failed to bring a motion to suppress this evidence and seek dismissal of the case. Because the sole evidence against Mr. Glace was the marijuana obtained during the illegal search, Mr. Glace's conviction should be reversed and dismissed.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of July, 2008.



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ANNE M. CRUSER, WSBA#27944  
Attorney for Mr. Glace

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STATE OF WASHINGTON  
BY \_\_\_\_\_  
DEPUTY

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON  
DIVISION II

STATE OF WASHINGTON,	)	Court of Appeals No. 37247-9-II
	)	Cowlitz County No. 07-1-01239-4
Respondent,	)	
	)	
vs.	)	AFFIDAVIT OF MAILING
	)	
EDDY GLACE,	)	
	)	
Appellant.	)	
_____	)	

ANNE M. CRUSER, being sworn on oath, states that on the 30<sup>th</sup> day of July, 2008  
affiant placed a properly stamped envelope in the mails of the United States addressed to:

Susan I. Baur  
Cowlitz County Prosecuting Attorney  
312 S.W. 1<sup>st</sup> Avenue  
Kelso, WA 98626

AND

David C. Ponzoha, Clerk  
Court of Appeals, Division II  
950 Broadway, Suite 300

AND

Eddy D. Glace  
DOC# 949895

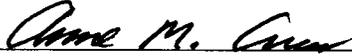
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- (1) AMENDED BRIEF OF APPELLANT
- (2) MOTION TO AMEND BRIEF
- (3) AFFIDAVIT OF MAILING

Dated this 30<sup>th</sup> day of July, 2008

  
 ANNE M. CRUSER, WSBA #27944  
 Attorney for Appellant

I, ANNE M. CRUSER, certify under penalty of perjury of the laws of the State of Washington that the foregoing is true and correct.

Date and Place: July 30, 2008, Kalama, WA

Signature: Anne M. Cruser